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No. 03-1353

Supreme Court, U.S.
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In The

Supreme Court of the United States

STEPHEN C. ORR,

Petitioner,

vs.

WAL-MART STORES, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OPPOSING PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit Court of Appeals erred in determining that Orr had never argued in the District Court that he was substantially impaired in the major life activity of eating, and therefore declining to consider the argument on appeal.

2. Whether the Eighth Circuit Court of Appeals erred in affirming the District Court in finding that Orr was not substantially impaired in any major life activity as a matter of law.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

CITATIONS OF OPINIONS AND ORDERS CITED BELOW 1

STATEMENT OF THE CASE 1

A. The New Chadron Wal-Mart Store 1

B. Wal-Mart Hires Orr 3

C. Orr Closes the Pharmacy 4

D. Wal-Mart Terminates Orr's Employment 7

E. Orr's Alleged Disability Under The ADA 7

ARGUMENT AND AUTHORITY 11

I. THERE IS NO CONFLICT AMONG THE CIRCUITS SUPPORTING CERTIORARI BECAUSE THE EIGHTH CIRCUIT COURT OF APPEALS, CONSISTENT WITH THE OTHER CIRCUITS, SIMPLY REFUSED TO CONSIDER AN ARGUMENT ON APPEAL THAT ORR NEVER RAISED IN THE DISTRICT COURT 11

II. ORR WAS NOT SUBSTANTIALLY IMPAIRED IN ANY MAJOR LIFE ACTIVITY 13

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Amir v. St. Louis University, 184 F.3d 1017 (8th Cir. 1999) 13

Bragdon v. Abbott, 524 U.S. 624 (1998) 12

Dothard v. Rawlinson, 433 U.S. 321 (1977) 12

Heaser v. The Toro Company, 247 F.3d 826 (8th Cir. 2001) 11

Lawson v. CSX Transportations, Inc., 245 F.3d 916 (7th Cir. 2001) 12, 14

Shelton v. Conti Group Cos., 285 F.3d 640 (8th Cir. 2002) 11

Simple v. Midwest Property Management LP, 209 F.3d 678 (7th Cir. 2000) 12

Snow v. Ridgeview Medical Center, 128 F.3d 1201 (8th Cir. 1997) 11

Stephen C. Orr v. Wal-Mart Stores, Inc., 297 F.3d 720 (8th Cir. 2002) 1, 11, 13, 14, 15, 16

Stephen C. Orr v. Wal-Mart Stores, Inc., 7:99CV5020 (D. Neb. 2001) 1

Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) 12, 14, 16

STATUTES

Neb. Rev. Stat. § 48-1119(4) 7

RESPONDENT WAL-MART STORES, INC. BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CITATIONS OF OPINIONS AND ORDERS CITED BELOW

Stephen C. Orr v. Wal-Mart Stores, Inc., 7:99CV5020 (United States District Court for the District of Nebraska) (Appendix A to Petition at 1a); *Stephen C. Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720, *rehearing and rehearing en banc denied* (8th Cir. 2002) (Appendix B to Petition at 1b).

STATEMENT OF THE CASE

Petitioner Stephen C. Orr ("Orr") misstates many of the facts in his statement of the case and omits altogether many of the undisputed facts upon which the Court of Appeals and District Court based its decision.

The facts recited below were set forth to the District Court as the statement of undisputed facts. References to "JA" refer to the "Joint Appendix". References to "SA" refer to the "Supplemental Appendix".

A. The New Chadron Wal-Mart Store.

Wal-Mart opened a new store and pharmacy in Chadron, Nebraska on January 26, 1998. At the time of the opening, there were two other pharmacies in town which had been there for many years and remained open for business during the lunch hours. (JA 186: 55:25-56:20; 129 and 130). Nebraska Law requires the store to post the hours of operation and post a notice that the pharmacist is gone and no prescriptions may be filled, when the

pharmacist is not present. (JA 48:15-20). 172 NAC 128.003.04A1c. (AD) Thus, the posted pharmacy hours at Wal-Mart were 9-7 Monday through Friday and 9-6 on Saturday; these posted hours did not state that the pharmacy would be closed from 12:00-12:30 p.m. (JA 68:4-14). The Chadron pharmacy was not busy, averaging approximately 30 scripts per day (JA 71:16-21; 131 ¶ 6).

Nebraska Law requires that the pharmacy not dispense any medication if a licensed pharmacist is not on duty and the pharmacy must close. 172 NAC 128.003.04A1c. (AD)[1] Further, Nebraska law permits technicians to work with a pharmacist but they must be under the "direct supervision" of a pharmacist "on duty" and may not be working in the pharmacy if the pharmacist is not present. 172 NAC 128.002.46 & 002.47 (AD) The technician may do everything that the pharmacist does, but he may not take prescriptions over the phone, verify prescriptions or counsel patients. (JA 120:2-12). In addition to these state law requirements, Wal-Mart's rules precluded anyone from being present in the pharmacy when the pharmacist was not there, and the pharmacist was required to lock and secure the pharmacy. (JA 68:15-25; 183:1-184:1). The pharmacy manager's principal duty was to serve the customers. (JA 57:13-58:2).

Since before 1995, Wal-Mart's stated policy has been that pharmacists in the single pharmacist store must staff the pharmacy during all business hours and must take all meal breaks and other breaks in the pharmacy. (JA 66:21-67:1;129, 130 & 144). Only pharmacists in one-pharmacist

[1] AD refers to "addendum".

pharmacies may keep food and drink in the pharmacy. The other staff may not. (JA 67:2-6). However, in 2000, problems in retention and recruitment compelled Wal-Mart to permit pharmacists in one-pharmacist stores to close after the lunch hour from 1:30 to 2:00 and at no other time (JA 134; 136 and 137).

B. Wal-Mart Hires Orr.

Orr interviewed with Pharmacy District Manager Rick Coleman ("Coleman"), who was the former District Manager over the Chadron, Nebraska pharmacy. (JA 51:14-22). Orr informed Coleman that he was diabetic and needed to eat meals and snacks to control his diabetes. (JA 52:14-24). Contrary to Orr's assertion, Orr did not inform Coleman that he needed to regularly monitor his blood sugar or inject himself with insulin to properly control his diabetes. Rather, Orr merely disclosed his diabetic condition. (JA 52:14-24). Coleman did not react adversely to Orr's disclosure of his diabetes; Coleman told Orr he could eat meals and snacks and made a job offer to him thereafter. (JA 54:25-55:9). Importantly, Coleman never told Orr that he could have an uninterrupted lunch break; thus, Orr's representation notwithstanding, there was simply no agreement between Wal-Mart and Orr to allow him uninterrupted lunch breaks. (JA 120:2-12; 121:7-9; 122:3-20).

Neither Coleman nor Orr's subsequent supervisor, John Foss ("Foss"), told Orr that he could close the pharmacy to eat lunch (JA 120:2-12; 121:7-9; 122:3-20) and Orr never received a document stating that he could close the pharmacy. (JA 54:6-16). Orr never told Coleman that he needed to close the pharmacy and eat lunch outside of the

pharmacy, but rather just assumed that he could. (JA 53:17-20; 103:12-17). Orr admits no one told him he could not eat meal breaks in the pharmacy or take snack breaks. (JA 54:17-24). Orr acknowledged that Foss never told Orr that he could not have a lunch break or snack break at all. (JA 74:5-8).

When Coleman hired him, Orr knew that he would be the only pharmacist in the store. He also knew the hours were 9-7 and indicated in his application that he could work those hours. (JA 49:14-50:7; 139). Orr also signed a matrix of essential job functions in which he stated that "he had the ability to perform all of the functions highlighted above." (JA 63:5-22; 154). Although asked, Orr did not indicate on that form that he needed an accommodation to perform any of the functions. (JA 64:19-25).

C. Orr Closes the Pharmacy.

Foss first learned that Orr was closing the pharmacy at noon for lunch sometime in mid-February 1998. Foss told Orr that he could not do that under the Policy. (JA 73:2-10; 129 ¶ 8). Orr did not say that he needed to close the pharmacy to control his diabetes at that time. (JA 74: 5-8). As indicated below, contrary to Orr's unsupported assertion, there is absolutely no evidence that Foss told Orr that he would have to stay in the pharmacy the entire time he was working, overseeing the pharmacy techs, and that Orr could only eat in between serving customers.

Orr continued to close the pharmacy in late February 1998 despite Foss's discussion with him. After Foss learned that Orr was closing the pharmacy, he gave Orr a "performance coaching" known as a "decision making day." Foss issued the discipline because Orr was violating the

Wal-Mart Lunch Policy by closing the pharmacy. (JA 75:19-76:1; 133, ¶ 8; 142 & 143) handwritten and typewritten copy of performance coaching). Orr's contention notwithstanding, his performance coaching was not because he took a lunch break, but because he closed the pharmacy to do so. Orr even admits that Foss gave him the performance coaching because he closed the pharmacy and not because he was diabetic. (JA 78:3-7). Further, during the performance coaching, Orr never told Foss that he had to have uninterrupted lunch breaks to control his diabetes or mentioned his diabetes at all. (JA 78:20-25).

Orr acknowledged that when he closed the Wal-Mart pharmacy to take lunch outside of the pharmacy, he violated Wal-Mart's policy for one-pharmacist stores concerning work hours. (JA 79:9-14). Orr also admits that when he closed the pharmacy for lunch, no one could take phone prescriptions or fill or dispense prescriptions. (JA 78:8-19).

Orr wrote a letter to Foss on March 12, 1998 complaining about the write up, but did not allege that his diabetes was out of control or impaired. (JA 93:5-94:9; 160). Thus, Orr's statement that he "tried to comply with [Wal-Mart's] request but was unable to do so because of his diabetes" is simply not supported in the record. (See Plaintiff's Petition for Writ of Certiorari, p. 3). Orr wrote a subsequent letter complaining about the Lunch Policy. (JA 94:10-18; 161). At no time during his employment with Wal-Mart did Orr submit medical records such as his blood sugar tests or a note from his doctor to Foss or anyone else indicating that he had to close the pharmacy to have an uninterrupted lunch break. (JA 95:13-23; 100:2-15). Orr has never been told by a doctor that there was a specific amount of time over which he should consume his meals

each day to maintain control of his diabetes. (JA 41:10-15). Rather, Orr admits that he only should try to eat at the same time each day to maintain control and he just felt that he had a medical need to eat at noon each day. (JA 40:10-19; 41:16-23; 42:2-8). Thus, Orr's assertion that "his consultation with his doctor, his prior experience and training have led to this regimen of control for his diabetes" (see Plaintiff's Petition for Writ of Certiorari, p. 4) has no basis in the record. More importantly, Orr never testified nor offered evidence that he required a "nutritionally complete meal" as he suggests in his Petition.

Foss responded by letter informing him that he could eat in the pharmacy and close the pharmacy to get food and come back. Foss provided the names of persons Orr could contact if he did not agree with the result. (JA 96:19-97:7; 162). Orr understood this letter (JA 162) to indicate that Foss thought Orr could adequately perform his job and that his diabetes did not impair his performance. (JA 98:17-20; 99:8-12).

On May 7, 1998, Orr sent a letter to Foss telling him that he was going to begin closing the pharmacy again at noon for lunch. (JA 162; 100:18-25). When Orr sent the letter, he knew he was informing his boss that he intentionally would be violating the Lunch Policy, the decision making day and Foss's direction. (JA 101:1-102:7). He also knew that the customers would not get any service when he closed the pharmacy. (JA 101:8-13).

Orr contends that the only effective accommodation at Wal-Mart would have been for him to close the pharmacy at noon each day to take an uninterrupted lunch break. (JA 92:1-7;108:3-109:21; 91:25-92:7). He proposed no other

accommodation to anyone at Wal-Mart. (JA 91:10-24; JA 4, ¶ 14).

D. Wal-Mart Terminates Orr's Employment.

Orr continued to close the pharmacy again until he was terminated on May 12, 1998 for "failing to perform job duties" by closing the pharmacy and violating the decision making day. (JA 141; 141 Ex. 10, 130, ¶ 13; 104:22-25; 4, ¶12). Orr admits that "he has no evidence that Foss terminated him for any reason other than his violation of the policy and violation of his decision making day." (JA 117:7-11). Orr cannot identify any pharmacist at Wal-Mart that willfully violated the lunch policy and closed the pharmacy and violated a decision making day who was not terminated. (JA 113:5-10). Similarly, Orr is unaware of any pharmacist in a single pharmacist store that was not required to eat in the pharmacy. (JA 112:7-19).

Orr subsequently filed a charge of disability discrimination which was rejected by the NEOC and dismissed pursuant to Neb. Rev. Stat. § 48-1119(4). (JA 165). Orr filed suit on October 19, 1999. (JA 1). The District Court granted summary judgment to Wal-Mart, determining that Orr did not qualify as an individual with a disability within the meaning of the ADA. The Court found it unnecessary to reach the other arguments of Wal-Mart. (JA 127).

E. Orr's Alleged Disability Under The ADA.

Orr contends that his diabetes is a physical condition that substantially impairs the major life activity of working in his position without an uninterrupted lunch break. (JA 4, ¶ 10). During the time he worked at Wal-Mart, Orr

claims that the only major life activity that his diabetes impaired was his ability to work at Wal-Mart when he had to eat in the pharmacy and allegedly experienced low blood sugar as a result. (JA 118:23-119:12).

However, Orr has never filed for disability benefits or social security benefits, nor has Orr's doctor ever placed him on a work restriction because of his diabetes. (JA 27:22-28:3; 44:22-24). Orr has never missed work because of high blood sugar. (JA 32:11-13). Orr has never missed work because of low blood sugar that did not result in unconsciousness. (JA 34:16-19). Orr has never lost consciousness from a hypoglycemic episode while working. (JA 30:4-9).

Orr claims that he had low blood sugar when he worked at Wal-Mart because he could not close the pharmacy, but the only days he can identify on which this occurred are the days contained in his diary, Exhibit 24. (JA 127:8-24; 115:7-14). Generally, when Orr has low blood sugar, it does not prevent him from physically doing anything he wants to do at work or otherwise. It may simply slow or impede his performance but he is able to get done what he wants to get done physically if he has enough time. (JA 33:12-24). Orr claimed it only impaired his ability to fill prescriptions. (JA 115:2-6). When Orr experienced low blood sugar at Wal-Mart, he corrected it by eating something. (JA 80:15-85:24). Orr's body responds fairly rapidly to the food or snacks and it stabilizes his low blood sugar noticeably within 3-5 minutes. (JA 38:24-39:23). Importantly, there never was a time when Orr worked at Wal-Mart where he was not able to eat lunch at all or was unable to correct the low blood sugar. (JA 88:12-18; 157-159). Orr admits that no one told him that he could not direct his subordinates to answer the phone and

wait on customers while he ate, and if he had done so he should have been able to control his blood sugar. (JA 228:depo. p. 221:13-22; JA 227:depo. p. 219:10; 220-24). Orr never called a doctor any of the times he had low blood sugar at Wal-Mart, since he was always able to correct it. (JA 86:21-87:3). Orr never visited or contacted his doctor while he worked at Wal-Mart to help him control his blood sugar. (JA 88:19-89:16).

Orr never missed work at Wal-Mart because of his diabetes, and never was unable to drive to or from Wal-Mart because of it. (JA 43:6-14). He is unaware that he ever committed an error because of his diabetes or that anyone has complained that he made an error at work. (JA 34:8-15; 45:19-22). Orr was able to complete his shift at Wal-Mart each time he had low blood sugar and perform the functions of his pharmacy position although it might have taken longer when it was low. (JA 85:4-9).

Orr conceded that he had the ability to perform all of the physical requirements set forth in Exhibit 23 (JA 154) before and while he worked at Wal-Mart. (JA 64:19-25). Orr has never applied for nor sought a job that he was not able to perform because of his diabetes. (JA 114:6-9). Likewise, there was no job he claims he was unable to retain because of diabetes, except for Wal-Mart. (JA 114:24-115:6). Indeed, Orr has been employed as a pharmacist continuously since he became diabetic and was so employed following his termination at Wal-Mart. (JA 116:8-18; 167-168; 110:15-111:24).

Orr used a glucometer while employed at Wal-Mart to measure the amount of glucose in his blood, but there is no evidence in the record that he ever had to administer

insulin while at Wal-Mart. Thus Orr's statement indicating otherwise is misleading, at best. Further, to clarify Orr's statement that "Shortly after being employed by Wal-Mart, Mr. Orr began using an insulin pump which is attached to his body 24 hours a day to maintain a normal insulin regimen" (Plaintiff's Petition for Writ of Certiorari, p. 4), Orr did not use an insulin pump at all during his employment with Wal-Mart, but rather only after he was terminated (JA 189: depo. p. 67:19-68:12).

Finally, Orr contends that "Some of the ways that Mr. Orr's diabetes impacted his life, in addition to monitoring his blood level and injecting himself with insulin and eating regularly scheduled nutritionally complete meals, are deteriorating vision, slurred speech, frequent urination, lack of concentration, lack of physical strength, lack of coordination, troubles walking, and the loss of conscieceness [sic]." (Plaintiff's Petition for Writ of Certiorari, pp. 4-5). However, Orr concedes that when he has problems with coordination, it simply may slow his typing but does not prevent him from doing so. (JA 194:depo. p. 85:22-86:5). When Orr's vision is impaired, he has to concentrate more to read, but it does not prevent him from reading. (JA 194:depo. p. 86:6-13). When Orr's speech is slurred, he is still able to communicate. (JA 194:depo. p. 86:19; 87:4).

ARGUMENT AND AUTHORITY

I. THERE IS NO CONFLICT AMONG THE CIRCUITS SUPPORTING CERTIORARI BECAUSE THE EIGHTH CIRCUIT COURT OF APPEALS, CONSISTENT WITH THE OTHER CIRCUITS, SIMPLY REFUSED TO CONSIDER AN ARGUMENT ON APPEAL THAT ORR NEVER RAISED IN THE DISTRICT COURT.

The cornerstone of Orr's request for Certiorari is that the Eighth Circuit erred in refusing to decide whether he presented a fact issue that he was substantially impaired in the major life activity of eating. But the court of appeals never reached the merits of that argument. Rather, it declined to address the assertion on the long-standing principal that the Court of Appeals "will not address an argument raised for the first time on appeal." *Orr*, 297 F.3d 725 *citing Shelton v. Conti Group Cos.*, 285 F.3d 640, 643 (8th Cir. 2002).[2]

Contrary to Orr's assertion, the Court of Appeal's opinion does not conflict with any other circuit as it is a uniform rule among the circuit courts that they will not address arguments not raised in the lower court. For example, the Seventh Circuit Court of Appeals has held that a plaintiff cannot raise new major life activities on

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[2] The Eighth Circuit Court of Appeals has regularly applied this doctrine in ADA cases. *E.g., Snow v. Ridgeview Medical Center*, 128 F.3d 120, 1206 n. 2 (8th Cir. 1997) (Court refused to permit appellant to argue for the first time on appeal of a summary judgment order that she was perceived as disabled or had a record of a disability when she only argued her actual disability to the district court); *Heaser v. The Toro Company*, 247 F.3d 826, 832 (8th Cir. 2001) (Court will not consider "interactive process" argument not raised in district court).

appeal that were not identified in opposing summary judgment in the District Court, *Simple v. Midwest Property Management LP*, 209 F.3d 678, 684 (7th Cir. 2000). Moreover, the Eighth Circuit's decision is fully consistent with Supreme Court precedent. Indeed, this Court refused to consider other major life activities that a physical condition might affect that were not asserted by the plaintiff in the district court, on appeal or in the Rule 14(1)(a) statement of issue. *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998); *see also Dothard v. Rawlinson*, 433 U.S. 321, 323 n. 1 (1977) ("Not having been raised in the District Court, that issue is not before us.").

Because the Court of Appeals never reached the merits of his eating disability argument, there could be no conflict with *Lawson v. CSX Transportations, Inc.*, 245 F.3d 916 (7th Cir. 2001) as Orr contends.[3] (Orr Petition at

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[3] The Majority Panel further held that even if it were to consider Orr's argument that he was substantially impaired in eating, it did not create a material issue of fact.

> Even if the limitations on Orr's ability to eat can be tied to his ability to work, they cannot salvage his claim under the ADA. "When the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at a minimum, that plaintiffs allege they are unable to work in a broad range of jobs." *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 491 (1999). *See also* 29 C.F.R pt. 1630.2(j)(3)(i), App. § 1630.2(j) (2000). The record reveals only that Orr's diabetic condition occasionally produced symptoms which moderately impaired his performance as a pharmacist in a single-pharmacist-on-duty retail store. In contrast to the diabetic plaintiff in *Lawson*, Orr consistently performed the essential functions of a pharmacist before, during, and after his employment with Wal-Mart. Because Orr's diabetes, as portrayed by the record in this case, at most, only moderately limits his ability to perform

(Continued on following page)

8) In any event, the Eighth Circuit does not dispute that eating is a major life activity. *Amir v. St. Louis University*, 184 F.3d 1017, 1027 (8th Cir. 1999) (eating was substantially impaired where plaintiff could not eat without vomiting). Accordingly, Orr's Petition does not offer the "compelling reasons" for the Supreme Court to review the decision as there not only is no conflict in the decision with any of the circuits but it is fully consistent with the precedent of the other circuits and the Supreme Court. Rule 10(a) & (c). In the end, Orr simply seeks to quarrel with the Majority Panel and other justices of the entire Eighth Circuit Court of Appeals who refused to hear *en banc* an argument he never raised in his complaint, deposition testimony or the district court.[4] *Orr*, 297 F.3d at 725.

II. ORR WAS NOT SUBSTANTIALLY IMPAIRED IN ANY MAJOR LIFE ACTIVITY.

Similarly, Orr's second issue does not compel review by the Supreme Court as he again misstates the facts and the issue. As the majority panel noted, the "[Supreme] Court concluded that a diabetic is not *per se* disabled but must demonstrate his condition substantially limits one or

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> a particular specialized job or a narrow range of retail pharmacist jobs, his diabetic condition does not place substantial limitations on his ability to work.

Orr, 297 F.3d at 725 n. 6.

[4] Indeed, Orr's Brief Opposing Summary Judgment in the District Court never suggested that he was substantially impaired in eating. (SA 9 & 10).

more major life activities." (*Orr*, 297 F.2d at 724, *citing Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483 (1999)). Further, if medication and other measures eliminate the limitations, there is no present substantial impairment. *Id.*

Following *Sutton*, the majority panel held that Orr did not have a substantial impairment of a major life activity because he simply identified substantially limiting impairments that "might, could, or would" exist if he failed to control his diabetes through insulin and diet. *Orr*, 297 F.3d at 724 *citing Sutton*, 527 U.S. at 482. Indeed, citing several opinions from the Eighth Circuit, the majority panel held that "Orr failed to present evidence explaining either how diabetes substantially affects his major life activities or the duration and frequency of any limitations." *Orr*, 297 F.3d at 724-25 (citations omitted).[5]

Orr, however, admitted that he had never received disability benefits, had never been unable to work as a pharmacist because of his diabetes, could stabilize his blood sugar with food in three to five minutes and even with low blood sugar could physically do what he wanted to do, it just took more time. Moreover, Orr never missed work at Wal-Mart because of his diabetes, and never was

[5] The majority panel also observed that Orr's condition is simply not comparable to the diabetic in *Lawson*. "In contrast to the diabetic plaintiff in *Lawson*, Orr consistently performed the essential functions of a pharmacist before, during, and after his employment with Wal-Mart." *Orr*, 297 F.3d at 725 n. 6. Specifically, the record in *Lawson* demonstrated that he experienced "severe" difficulty in controlling his diabetes with either insulin or diet resulting in his inability to work for over 14 years and his receipt of social security disability benefits. *Lawson*, 245 F.3d at 919-20.

unable to drive to or from Wal-Mart because of it. Orr admitted he did not commit an error at Wal-Mart because of his diabetes, or that anyone complained that he did so. He was able to complete his shift at Wal-Mart each time he had low blood sugar and perform the functions of his pharmacy position, although it might have taken longer when it was low. Orr conceded that he had the ability to perform all of the physical and mental requirements set forth in his job description before and while he worked at Wal-Mart.

Contrary to Orr and the dissent's assertion, Orr's deposition testimony and alleged medical record do not support present limitations. Orr has not experienced meaningful impairments from his diabetes since the eighties, and there were no medical reports in the record at all as contended by the dissent. *Orr*, 297 F.3d at 726-27.

Although Orr dramatically declares in his Petition for Certiorari that Wal-Mart refused to allow him to mitigate his diabetes, this simply is not what the record showed and is, at best, a disingenuous statement of the facts. Orr cannot accuse Wal-Mart of refusing to permit him to mitigate his diabetes when he could not meet his obligation to present any evidence that he actually experienced any substantial limitation from his diabetes while employed with Wal-Mart.

CONCLUSION

In the end, *Orr* is an unremarkable case in which the Eighth Circuit Court of Appeals, properly applied the precedent of the Supreme Court in *Sutton* and concluded that Orr was not substantially impaired in any major life activity on the record before the Court. Wal-Mart Stores, Inc. respectfully requests that the Supreme Court deny Orr's Petition for Writ of Certiorari.

Respectfully submitted,

Wal-Mart Stores, Inc.,
Respondent

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